

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayner
Marshall Johnson
Ken Nickolai
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Commission Investigation
into ILEC Unbundling Obligations as a Result
of the FCC Triennial Review Order

ISSUE DATE: December 18, 2003

DOCKET NO. P-999/CI-03-961

ORDER NARROWING SCOPE OF
PROCEEDING

PROCEDURAL HISTORY

On February 20, 2003, the Federal Communications Commission (FCC) adopted its Triennial Review Order,¹ which revised the federal rules governing the obligations of incumbent local exchange carriers to unbundle certain elements of their networks and make them available to competitive carriers at cost-based rates.² On August 21, 2003, the FCC released the text of that Order. The effective date of the Order and the new rules is October 2, 2003.

In the Order the FCC refined its definition of the “impair” standard, the touchstone in determining which network elements must be unbundled, and explained the significance of other policy factors in reaching unbundling determinations. For some network elements, such as the high-frequency portion of the loop and “greenfield” fiber loops, the agency made binding nation-wide findings and set nation-wide rules on incumbent local exchange carriers’ unbundling obligations.

For other network elements, the agency adopted a rebuttable presumption for or against unbundling, and delegated to state commissions the authority to make final determinations, applying federal standards. And for other network elements, the agency articulated the principles

¹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Released August 21, 2003.

² 47 U.S.C. §§ 251(c)(3), 252(d)(1); 47 C.F.R. § 51.307 *et seq.*

to be applied in making unbundling determinations, found that these determinations required fact-intensive, local evidentiary inquiries, and delegated the responsibility for those inquiries to the state commissions. The FCC required that these state proceedings be completed within nine months of the effective date of the Triennial Review Order.³

On October 3, 2003, the Commission issued its *Order Opening Investigation and Notice and Order for Hearing* in this case, beginning the nine-month proceeding required under the Triennial Review Order. In that Order the Commission required the parties to respond within two months to a list of questions intended to help focus and expedite the investigation. The Commission reserved for itself responsibility for reexamining and potentially redefining the scope of the case in light of the parties' answers to these questions.

On November 18, 2003, the Commission issued an Order approving the parties' proposal to work on developing a low-cost batch hot-cut process, required under the Triennial Review Order to facilitate mass market competition, in a multi-state forum.⁴ Any process developed in that context will be submitted for Commission review and approval in this proceeding.

On or before December 4, 2003, the following parties filed responses to the questions listed in the October 3 Order:

- Minnesota Department of Commerce
- AT&T Communications of the Midwest, Inc. and TCG Minnesota, Inc., filing jointly as AT&T
- MCImetro Access Transmission Services LLC; MCI WorldCom Communications, Inc.; and Brooks Fiber Communications of Minnesota, Inc., filing jointly as MCI
- Qwest Corporation
- Sprint Minnesota, Inc. and Sprint Communications Company L.P., filing jointly as Sprint
- DIECA Communications, Inc. d/b/a Covad Communications Company
- Time Warner Telecom of Minnesota, LLC

³ The FCC also set a 90-day deadline for state petitions to rebut, as to specific local markets, the agency's presumptive, nation-wide finding that competitive local exchange carriers are not impaired in serving enterprise customers without unbundled access to local circuit switching. This Commission has opened a separate proceeding to investigate the claims of two carriers that there are specific markets in Minnesota where impairment should be found. *In the Matter of a Commission Investigation into the FCC Triennial Review Order's National Presumptive Finding of No Impairment for Local Switching on High Capacity Loops Available to Business Customers*, Docket No. P-999/CI-03-960, Order Opening Investigation and Notice and Order for Hearing (September 30, 2003).

⁴ Order Endorsing Multi-State Forum, Encouraging Participation, and Adopting Schedule and Procedural Requirements, this docket, November 18, 2003.

All parties agreed that the issues in the case had narrowed significantly since the October 3 Order was issued, mainly because Qwest, Minnesota's dominant incumbent local exchange carrier, had filed notice that in this case it intended to challenge only one of its presumptive unbundling obligations – mass market switching.

On December 11, 2003, the matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. The Parties' Comments

All commenting parties agreed that the only remaining issue in this case is whether there are specific geographic markets in Minnesota where competitive carriers would *not* be impaired in their ability to provide the services they seek to offer by the absence of unbundled access to mass market switching. This issue, of course, turns on myriad intermediate facts and issues.

Several parties commented on these intermediate issues, such as the definition of “market” and the point at which customers should be categorized as “enterprise” (business) customers instead of mass market (residential customers). All parties, however, reserved their right to change their positions in light of future evidentiary developments. Also, the parties who addressed the issue of timing urged the Commission to defer decision-making on intermediate issues until the record had been developed and the case returned from the Administrative Law Judge.

II. Commission Action

The Commission originally referred three broad issues to the Administrative Law Judge:

The Commission hereby refers for contested case proceedings, as set forth above, the issue of whether there are within this state specific geographic markets, customer locations, or transmission routes for which competitive local exchange carriers would not be impaired by the absence of unbundled access to mass market switching, high-capacity loops, or dedicated transport.

Ordering paragraph 1, October 3 Order.

The Commission concurs with the parties that only the first issue – impairment in the absence of mass market switching, including compliance with the requirement to develop a low-cost batch hot-cut process – remains. The Commission will narrow the scope of this proceeding accordingly.

ORDER

1. The Commission hereby redefines the scope of this proceeding by eliminating two of the issues originally referred for contested case proceedings and set forth below:
 - (A) whether there are within this state specific geographic markets, customer locations, or transmission routes for which competitive local exchange carriers would not be impaired by the absence of unbundled access to high-capacity loops; and
 - (B) whether there are within this state specific geographic markets, customer locations, or transmission routes for which competitive local exchange carriers would not be impaired by the absence of unbundled access to dedicated transport.
2. Contested case proceedings shall continue on the remaining issues, which relate to impairment in the absence of access to unbundled mass market switching, including issues relating to the low-cost batch hot-cut process.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice) or 1-800-627-3529 (TTY relay service).